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ABSTRACT

The issue of discrimination against Asian-Americans in higher education is discussed. The focus is on: whether certain of the country's most prestigious universities discriminate against Asian-American applicants; why this occurs; and what university officials, executive branch administrators, and members of Congress can do about it. Suspicions arise because university admissions committees tend to be extremely vague about the impact of race on their acceptance/rejection decisions. Though minority status can add 40 to 50 percentage points to an applicant's chance of admission, such racial preferences generally do not operate in favor of Asian-Americans and are often quite the opposite. Statistical evidence shows these candidates face higher hurdles than academically less qualified candidates of other races. One study shows the cultural bias and stereotypes that prevail in the admission office work to the detriment of Asian-American applicants. Rejection of such applicants appears to be driven by university affirmative action policies aimed at favoring other, preferred racial minorities. Thus, where admissions policies are primarily merit-based, Asian-Americans will in all likelihood be accepted in numbers that far outstrip their percentage share of the general population. Three suggestions for action are: universities should continue to their self-scrutiny; the Department of Justice and Department of Education must play major roles; and Congress should be a major player in the effort to root out and bring to a halt any unlawful discriminatory admission policies at U.S. colleges and universities. (SM)

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REMARKS BY

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BEFORE THE

SYMPOSIUM ON ASIAN AMERICAN UNIVERSITY ADMISSIONS

DISCRIMINATION AGAINST ASIAN-AMERICANS IN HIGHER EDUCATION: EVIDENCE, CAUSES, AND CURES

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DISCRIMINATION AGAINST ASIAN-AMERICANS IN HIGHER EDUCATION: EVIDENCE, CAUSES, AND CURES

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I am very grateful to Senators Simon and Daschle for the opportunity to meet with you this afternoon. The questions we are discussing here are profoundly important ones, and it is a healthy sign that Congress and the public are paying attention to them. I will try briefly to address three aspects of the issue. First, are some of the country's most prestigious universities discriminating against Asian-American applicants? Second, if they are, then why? And, third, what can we -- university officials, Executive branch administrators, and members of Congress -- do about it?

I.

Charges that certain universities -- Berkeley, U.C.L.A., Harvard, Stanford, Princeton, Brown, and others -- are maintaining quotas to limit the number of Asian-American admissions have been made with alarming frequency in recent years. The charges are serious and, on the surface, they do not appear to be wholly implausible.

To their credit, some of the universities against which the charges are levelled have begun to examine their own admissions policies critically. Berkeley, for instance, has appointed a special Task Force, headed by Professor Yuan T. Lee, to investigate the issue.[1/] Outside investigators are also at work. As the Washington Post[2/] and N.Y. Times[3/] recently reported, the Office of Civil Rights of the Department of Education has targeted two other universities -- Harvard and U.C.L.A. -- for compliance reviews, to determine whether anti-Asian discrimination exists at those institutions.

At this stage of the investigations, the extent to which the charges may have merit cannot be determined. Even so, we view the accusations as cause for legitimate concern. In order to be fair to the universities under investigation, while at the same time suggesting what I perceive to be the true dimensions of the problem, I will paint with a broad brush, and refrain for now from depicting any particular institutions as culprits.

The first point to be made is that suspicions arise because university admissions committees tend to be extremely vague about the impact of race on their acceptance/rejection decisions.

1/ See Bernstein, "Asian Newcomers Hurt By Precursors' Success," N.Y. Times, July 10, 1988 (National), at 16, col. 1. We understand that the Task Force report, originally due out last August, has not yet been published.

2/ Vobejda, "Harvard, UCLA Admissions Policies Probed," Washington Post, Nov. 18, 1988, at A4, col. 1.

3/ Molotsky, "Harvard and U.C.L.A. Face Inquiries on Quotas," N.Y. Times, Nov. 20, 1988, at 35, col. 1.

Indisputably, the use of racial preferences is now standard practice in many of our major universities. This can make a profound difference to an individual candidate's chances of being selected.4/ Robert Klitgaard of Harvard found, in his acclaimed book Choosing Elites (1985), that at Williams, Colgate, and Bucknell, minority status added 40 to 50 percentage points to an applicant's chances of admission. Id. at 49. Nor are those three prestigious colleges in any respect exceptional. Indeed, Klitgaard found that, "[a]s a generalization, the more selective the college, the greater the preferential treatment for minorities," id. at 154.

Of particular interest to the topic at hand is the fact that such racial preferences generally do not operate in favor of Asian-Americans.5/ Indeed, quite the opposite is true -- they are the most likely explanation of the alleged discrimination against Asian-Americans.

There is, moreover, substantial statistical evidence that Asian-American candidates face higher hurdles than academically less qualified candidates of other races, whether those candidates be minorities (black, Hispanic, Native American) or

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4/ See Bunzel, "Affirmative-action admissions: how it 'works' at UC Berkeley," 93 The Public Interest 111, 117-118 & n.3 (1988). Dr. Bunzel (formerly a member of the U.S. Civil Rights Commission) cites to a study of Harvard Law School's admission procedures by Harvard Law Professor Alan Dershowitz and his associate, Laura Hanft. The Dershowitz-Hanft study says that the Admissions Committee was "circumspect" about the quantitative factors at work in its racial preferences.

5/ In the California system, however, persons of Filipino ancestry currently receive a preference.

white.[6] Thus, "white or Asian students are rarely accepted by Berkeley without a GPA [grade point average] of at least 3.7 or 3.8," while "virtually all American Indians, Hispanics, and blacks who apply to Berkeley, and who meet minimum UC requirements, are admitted" -- even though it is possible to meet those minimum standards with a GPA as low as 2.78.[7] And even

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[6] Underscoring these troubling statistics is the fact that, when challenged, university admissions officers defend their practices by reference to statistical benchmarks that are legally and logically irrelevant. The very weaknesses of such "defenses" raise disturbing questions about the fairness and the legality of the practices being defended. Thus, the New York Times (see n.3, supra) recently reported Thomas Lifka, Assistant Vice-Chancellor at U.C.L.A., as saying that while Asian-Americans make up 6% to 8% of California's high school graduates, they constitute 20.7% -- and, including Filipino-Americans, 24.7% -- of U.C.L.A.'s freshman class. But the overall racial make-up of the state's high school graduates is simply not a valid comparison for determining whether discrimination exists, since that benchmark totally disregards (for example) differences in the average academic qualifications of racial groups within the high school graduating class, and the different rates at which members of those groups apply for admission. When those circumstances are considered, as of course they must be, the evidence of discrimination against Asian-Americans may become much more powerful. In fact, Asian-American high school graduates in California have a significantly higher eligibility rate (26%) than whites (16%), Hispanics (6%), or blacks (4%). See Gibney, "The Affirmative Action Squeeze," The New Republic, April 11, 1988, at 15. And a significantly higher proportion of Californian Asian-American high school graduates take the SAT than do their Caucasian peers. See Bunzel & Au, supra, at 51 & n.1 (1983 data). Any comparison to the racial breakdown of the high school graduating class which omits reference to such crucial differences is bound to be misleading.

[7] See Bunzel, supra, at 119-120; see also Bunzel & Au, "Diversity or discrimination? Asian Americans in college," 87 The Public Interest 49, 50-51 & n.1 (1987). In 1987, the ratios of admissions to applications for Berkeley's freshman class for black and Hispanic applicants were, respectively, 84.2% and 88.4%; for Filipino-Americans, 51.3%; for Caucasians, 31.4%; and for (non-Filipino) Asian-Americans, 27.7%. (Source: Office of Student Research, January 7, 1988.)

when Asian-American admission rates are not compared to those of black, Hispanic, or Native American candidates (groups which are often the beneficiaries of racially preferential policies), but to the admission rates for Caucasians instead, the statistics again suggest that elite universities may be discriminating.

In 1982, for instance, the Asian-Americans to whom Harvard offered admission had average verbal and math SAT scores of 742 and 725, respectively, for a combined average of 1467; Caucasians had average SAT scores of 666 and 689, for a total of only 1355.[8/] "The figures suggest that in order to be offered admission, Asian Americans had to score on average 112 points higher on the SAT than Caucasians who were admitted." Not surprisingly, therefore, in 1982, Harvard's Asian-American admission rate (14%) was less than three quarters (.74) of the Caucasian admission rate (19%); and in 1983, the figure was even worse (below .70 of the Caucasian rate).[9/]

While these particular figures are now several years old, we expect that the Education Department's compliance review of Harvard will bring its more recent admission rates to light. We have no real confidence, however, that the updated information will show improved Asian acceptance rates (whether vis-a-vis

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8/ Compare the 1987 U.C.L.A. freshman class, in which the average Asian GPA was 3.91 (as against 3.8 for whites and 3.36 for blacks); in the same class, the average Asian SAT composite score was 1176 (as against a slightly higher 1185 for whites, but 912 for blacks). See Response to Assembly Concurrent Resolution 70, supra, at 6.13-6.14.

9/ Bunzel & Au, supra, at 54.

Caucasians or vis-a-vis all others). A 1988 study reports that "[t]he admit rates of Asian Americans have been up to 30% lower than average at Harvard for the past several years."[10/] Nor does it appear that Harvard stands alone in this regard. Figures from Brown University for the five-year period 1983-1987 reveal a trend of declining Asian-American admission rates coupled with improving academic quality (measured in SAT scores and class ranking) of Asian-American applicants.[11/] While there has been some subsequent improvement, Asians applying to Brown had the lowest admission rate of all five identified racial/ethnic groups in the 1983-1987 period.[12/]

There is other evidence of anti-Asian discrimination. A report by the Corporation Committee on Minority Affairs at Brown, for instance, found that the "cultural bias and stereotypes which prevail in the admission office" worked to the detriment of Asian-American applicants.[13/] There is anecdotal evidence as well. A member of the graduate school admissions committee at Princeton in 1983 has said that when the committee was going over the applicant list and reached a clearly qualified Asian-American, one colleague of his remarked, "We have a lot of them," and another said, "You have to admit, there are a lot."[14/]

10/ J. Hsia, Asian Americans in Higher Education and At Work 94 (1988).

11/ Id. at 96-100.

12/ Id. at 100-101.

13/ Cited in Bunzel & Au, supra, at 59.

14/ Cited in Bunzel & Au, supra, at 60 n.3.

II.

The picture that emerges from these admittedly "broad brush" strokes leaves, at the very least, the unsettling inference that many of the country's elite universities may well be practicing discrimination against Asian-American student applicants -- that is, evaluating their applications differently from the applications of non-Asian students of comparable qualifications. Assuming that further investigation bears out the "worst case" scenario of pervasive and systemic discrimination, the obvious next question is: what is its cause?

While university officials are understandably loath to admit that they are discriminating against qualified Asian-Americans, rejection of such applicants ironically appears to be driven by the universities' "affirmative action" policies aimed at favoring other, preferred racial minorities. The New Republic cut to the quick of the problem when it said:

> If Asians are underrepresented based on their grades and test scores, it is largely because of affirmative action for other minority groups. And if blacks and Hispanics are underrepresented based on their fraction of the population, it is increasingly because of the statistical overachievement of Asians.[15/]

The short of it is, quite simply, that where admissions policies are primarily merit-based, Asian-Americans will in all likelihood be accepted in numbers that far outstrip their percentage share of the general population (or even of the

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15/ See Gibney, supra, at 17.

applicant pool), but that fairly reflect their higher-than-average performance on objective measures of academic performance, such as grades, class rank, SAT scores, and so on. But where admission policies are skewed by a mandate to achieve some sort of proportional representation by race (as, for instance, has been true in the California university system since 1974[16/]), then, inevitably, there will be pressure to squeeze out Asian-Americans in order to make room for other minorities (or for whites[17/]). Under the regime of preferences, university admission becomes a racial zero-sum game: if your neighbor's ox isn't gored, then yours will be.

In other words, the phenomenon of a "ceiling" on Asian-American admissions is the inevitable result of the "floor" that has been built for a variety of other, favored racial groups. This has been the Department of Justice's objection all along to racial preferences, and the fact that the victims now are not white but members of other minority groups merely dramatizes the moral bankruptcy of the whole enterprise. Whether the preferences operate against Asians for the benefit of whites and blacks, or against whites and Asians for the benefit of some other groups, racial discrimination is indefensible.

16/ See the University of California's Response to Assembly Concurrent Resolution 70 at 3.22 (1988).

17/ "An Assistant Vice-Chancellor at Berkeley warned that 'if we keep getting well-prepared Asians, and we are, we may get to the point where whites will become an affirmative action group.'" Bunzel, "Choosing Freshmen: Who Deserves an Edge?", Wall Street Journal, Feb. 1, 1988, at 26, col. 3.

For seven-plus years now, I have remained steadfast in my opposition to quotas, "goals and timetables," and any other racial preference for a particular minority group. Critics invariably ask: what is wrong with giving a boost to blacks, or Hispanics, or whomever? There is a ready, and indeed unassailable, answer: inevitably, one group's preference unfairly disadvantages all others not fortunate enough to be members of that group. Any such racially-inspired policy for selecting some and rejecting others is discriminatory in the worst sense of the word. It measures prospective college students by color, not performance. And there appear to be strong indications that student applicants of Asian-American descent are being wrongly denied college admission at some universities under just such a misguided selection standard.

There is nothing "benign" or "affirmative" about the racially-inspired policy I have described. Whether the exclusionary admissions process that is targeted against Asians is calculated to benefit blacks or whites, it is legally and morally wrong. Discrimination by any other name is still discrimination, and it resides no more comfortably in an academic environment when the victims are Asian-Americans than when they are Black-Americans or Hispanic-Americans or Native Americans or European-Americans.

The predictable response from the campus scholars is that there is sufficient legal latitude to play this "numbers game" with the educational opportunities of our children as a result of

the Supreme Court's decision in University of California Regents v. Bakke, 438 U.S. 265 (1978). The pivotal opinion in that case was Justice Powell's. He there stated gratuitously in passing that it might well be permissible for a medical school to award a "plus" because of the applicant's race, 438 U.S. at 317, in order to achieve greater racial and ethnic "diversity." Justice Powell found no other members of the Court who were willing to endorse that proposition,[18] and more recent Supreme Court decisions appear to have wholly discredited it.[19] Nonetheless,

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18/ Justice Powell's Bakke opinion therefore cannot be construed as stating the law. But even if the standards his dictum describes were binding, many current race-based admissions policies might still not survive judicial scrutiny if those standards were applied to them. Justice Powell's opinion made it extremely clear that set-asides or numerical quotas in the admissions process are unlawful; race (in his view) could be considered only if it did not "insulate the individual from comparison with all other candidates for the available seats." 438 U.S. at 317; see also id. at 319, n.53 ("[i]f an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome"). Thus, an admissions program that in effect reserves a certain proportion of places for certain racial groups (perhaps by granting admission contingent only upon meeting minimum eligibility requirements), or that shelters members of such groups from head-on competition with every other candidate, would be legally questionable even under Justice Powell's standards.

19/ In a series of post-Bakke cases, including Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), Bazemore v. Friday, 478 U.S. 385 (1986), Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986), and United States v. Paradise, 107 S. Ct. 1053 (1987), the Supreme Court has upheld racial preferences only in a "remedial" context, as a last resort, and solely to combat egregious discrimination -- and even then it has required that such preferences be temporary and narrowly tailored. As for the Title VII cases, Steelworkers v. Weber, 443 U.S. 193 (1979), and Johnson v. Transportation Agency, Santa Clara Cty., 107 S. Ct. 1442 (1987), preferences were upheld there only in order to correct the obvious exclusion of virtually all minorities or all

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the academic community holds tight to this irrelevant dictum in Bakke as its apology for racial preferences. Thus, the buzzword invariably employed by university officials pressed to defend their race-conscious "affirmative action" programs is academic "diversity."

In practice, this "diversity" explanation operates more often than not as a "cover" for the allocation of freshman positions based on race -- precisely the evil condemned in Bakke.[20] Admissions results are less and less the product of informal and collegial decisionmaking by professors on a case-by-case basis, as Justice Powell seemed to assume, and more and more the product of an administrative bureaucracy. Thus, group statistics in many universities drive the admissions decisions, at the expense of individual achievement. While specific numbers of places are no longer overtly set aside, percentages are regularly assigned as a method of reserving slots for different

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19/ (...continued)
women from traditionally segregated job-categories -- and again, even then, only on a temporary and narrowly tailored basis. See also Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (governmental racial classifications must serve a compelling purpose). For a review and analysis of these Supreme Court cases, see Reynolds, "An Equal Opportunity Scorecard," 21 Ga. L. Rev. 1007 (1987).

20/ "It is not unusual to be told by officials at different universities that 'special sensitivity' is shown to certain ethnic minority groups, and that membership in such a minority group is an 'important factor' in allowing a candidate to be chosen over others who have better academic credentials. But these same officials are reluctant to discuss when 'special sensitivity' becomes outright preference, or how far they have to 'stretch' to get the representation of minorities they want. * * * They prefer to point to the 'diversity' they are creating." Bunzel, supra, 93 The Public Interest at 116-117.

minority and nonminority groups.[21] The losers under such a regime are those high school graduates deserving admission but passed over for less qualified applicants who are taken in order to satisfy percentage benchmarks. The claim is that Asian-Americans are among those who suffer most at the hands of these discriminatory policies -- and it appears that the charge may not be entirely without merit.

If this is the case, academic "diversity" provides no excuse for such behavior.[22] To be sure, as Justice Powell made clear

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21/ Berkeley, for instance, has for some time been operating a "mixed" system, in which 40% of incoming freshmen are admitted solely on the basis of academic grades and standardized test results (in 1985 it was 50%), 38% are offered spots under "special action" programs (these programs include preferences for blacks, Chicanos, Latinos, American Indians, and persons of Filipino descent), and 22% -- mostly whites and Asian-Americans -- selected by "supplementary" criteria, some of which (leadership, motivation) are highly subjective, others of which (English achievement, foreign language course work) may operate to the disadvantage of persons of Asian background, and all of which combined may have the designed purpose of limiting the admission of Asian-American "overachievers." The procedures are, indeed, admittedly designed to enable Berkeley to meet the University of California system's (and Berkeley's own) plan for a student body whose racial composition reflects that of the state's high school graduating class. See Bunzel, supra, 93 The Public Interest at 112-114; 118-119; Gibney, supra, at 16; Response to Assembly Concurrent Resolution 70, supra, at 3.10-3.13; Asian American Task Force on University Admissions, Task Force Report, 8-10; 12-13 (1985).

22/ It is ironic that the "diversity" rationale should apparently be working to exclude Asian-Americans. Asian-Americans hardly comprise a single, homogeneous class; on the contrary, they have richly diverse and highly distinctive cultural heritages -- Chinese, Korean, Taiwanese, Japanese, Filipino, Thai, and Vietnamese, among others. See Asian American Task Force on University Admissions, Task Force Report, supra, at 3. The ideological blinders of race-based selection processes -- which classify individuals solely by superficial characteristics such as pigmentation -- ignore such culturally-based forms of diversity.

in his Bakke opinion, there should be a noticeable reluctance, on grounds of academic freedom, to inject the government into a university's selection process. But that reluctance cannot permit a greater tolerance for race-based discrimination on our college campuses than we will allow with respect to other programs or institutions subject to federal civil rights laws. A college degree is every bit as important to an individual as a seat on a bus, membership in a union, or the ability to run for public office and participate in the electoral process. To suggest that this opportunity, like the others, be granted equally to high school graduates of all races and ethnic backgrounds, based on individual merit, hardly raises a threat to academic freedom. Rather, that proposition is, it seems, nothing short of a ringing endorsement of the very ideal of academic freedom.23/

III.

At this point, the question "What is to be done?" naturally arises. I have three suggestions.

First, I urge the universities to continue and to intensify their self-scrutiny. The California system, under some prodding by the Asian-American community and the State Legislature, has begun such a process. Although its investigations thus far leave

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23/ See Sweezy v,. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (one of "'"the four essential freedoms" of a university [is] to determine for itself on academic grounds * * * who may be admitted to study.'") (emphasis added; citations omitted).

important questions unanswered,[24/] it is a useful first step. I certainly encourage further investigations, both in California and elsewhere, and in both private and public universities.

Second, the Department of Justice and the Department of Education have major roles to play, particularly if the Education Department's compliance reviews of Harvard and U.C.L.A. find a case of unlawful discrimination. In this regard, a word as to the administrative procedure is in order.

The Justice Department cannot bring suit against a private, federally funded university (such as Harvard) under Title VI of the Civil Rights Act of 1964, unless it receives a prior referral from the Department of Education. But before the Department of Education makes such a referral, it must undertake a compliance review. Furthermore, under Title VI, if the Department of Education's compliance review finds a violation, that Department must try to remedy the discrimination through voluntary compliance efforts. In cases where the violations cannot be resolved through negotiations, the Department can elect either to

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24/ For instance, we have not seen any statistical analysis of GPAs and SAT scores for whites, for Asian-Americans (or specific subcategories -- Japanese-Americans, Chinese-Americans, etc.), and for non-Asian minorities among Berkeley entrants admitted on the basis of "supplemental criteria." Nor is it clear to us to what extent certain factors used to determine admission to Berkeley because of "special qualities" (e.g., athletic achievement, graduation from a rural high school) impaired the chances of Asian-Americans. Indeed, it is difficult to infer what percentage of Berkeley's freshman slots is awarded primarily or solely on the basis of race-conscious "affirmative action." See Berkeley's Discussion of the Section of the Auditor General's Report Concerning Freshman Admission to the College of Letters and Science 4-5 (1988).

proceed via an administrative enforcement proceeding to terminate federal funding, or it can refer the case to the Justice Department for a suit in federal court seeking injunctive relief.

Title IV of the Civil Rights Act, by contrast, does enable the Justice Department to bring suit directly, but only against a public university. To bring such a suit, the Justice Department first needs a written complaint signed by an individual (or parent), to the effect that the complaining individual has been denied admission to the university because of race. 42 U.S.C. 2000c-6(a)(2). Any complaints we have received (say, as to discrimination at U.C.L.A.), we have also asked the Department of Education to review; thus, when that process is completed, we are positioned to bring suit if the Department of Education's findings warrant it.

Finally, I think that Congress can and should be a major player in the effort to root out and bring to an abrupt halt any unlawful discriminatory admission policies at our colleges and universities. For example, Congress can legitimately use its own investigative authority to conduct hearings into the question of discrimination. Such an investigation could shed a great deal of light on the often shadowy, and highly discretionary, area of university admissions. We could hope to learn from such an inquiry (far more than from litigating in isolated cases) how the nation's universities' admissions processes really work, exactly how important a factor race is in admissions decisionmaking, and why there are so many disturbing reports from so many different

institutions throughout the country that some of our citizens are being discriminated against because of their Asian ancestry.

Congress also has the information-gathering powers to determine how substantial the costs are of discrimination of this kind. These include not only the human costs of unfairly denying people the educational opportunities which they deserve, and of preventing talented individuals from developing their true potential; they include also the more general societal and productivity costs that come from the compromising of rigorous academic standards and the scrapping of a truly meritorious selection system in the name of the social engineering scheme of racial "proportional representation." Simply by focusing public attention on the issue, and forcing university admissions officers to answer honestly some very tough, searching questions, Congress could do a great deal, in my judgment, to cure the problem at its source.

Discrimination based on race is a sinister evil. We have in the last eight years come a long way towards eliminating some of the worst features of such policies -- policies that encouraged the favoring of some, while disfavoring others, because of skin color or ethnic background. Any regime that allocates individual opportunity on a racially proportional basis -- be it defined by a quota, a goal, a set-aside, or some other reserved percentage -- is inherently pernicious and never benign. This is as true on the campuses of our colleges and universities as it is everywhere else in a democratic society. It therefore follows

that student admissions policies -- which hold the key to so many other opportunities for future generations of Americans, whatever might be their race, color, creed, or ethnic background -- deserve the strictest scrutiny.